Supreme Court, U.S.
FILED

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In The

**Supreme Court of the United States**

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Tony Falcon Leal Jr.

v.

University of Texas, UT Police Dept.
Larry Faulkner, Pat Clubb
Jeffery Van Slyke, Sellers Bailey,
Gonzalo M. Gonzales, & John D. Koehl

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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34 pp

## *QUESTIONS PRESENTED*

After failing to decide any substantive motions and adjudicate Plaintiff's case and after it was discovered that District Judge James Nowlin was a graduate of the university that Plaintiff was suing, Plaintiff motioned on February 26, 2003 for Judge Nowlin to recuse himself and Judge Nowlin denied that motion. (Judge Nowlin had left undecided all substantive motions including more than 10 of Plaintiff's substantive motions on this case filed more than 9 months earlier on May 16, 2002)

On July 8, 2003 the 5th Circuit Court of Appeals denied Plaintiff's Petition for Rehearing stating a recusal motion is not an appealable collateral order. A question of first instance is being posed.

*Question for Review*

Whether judicial disqualification decisions fall within the collateral order doctrine exception allowing appeal-ability before a final decision as initially enunciated in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). In order to insure the uniform application of fundamental due process, efficiency, and fairness I submit that this court is compelled to decide this case and answer in the affirmative.

## *LIST OF PARTIES*

Petitioner, Tony Falcon Leal Jr., ***Pro Se***, is a graduate of William Mitchell College of Law in St. Paul, Minnesota; Alma Mater of the late Chief Justice Warren Earl Burger; Respondents are the following: University of Texas, UT Police Dept., Larry Faulkner, Pat Clubb, Jeffery Van Slyke, Sellers Bailey, Gonzalo M. Gonzales, and John D. Koehl.

## *TABLE OF CONTENTS*

*Questions for Review* ..... *i*

*Table of Contents* ..... *ii*

*Table of Cited Authorities* ..... *iii*

*Table of Appendices* ..... *iv*

*Opinions Below* ..... *1*

*Statement of Jurisdiction* ..... *1*

*Statutory Provisions Involved* ..... *1*

*Statement of the Case* ..... *2*

*Reasons for Granting the Writ* ..... *7*

- *A. Inadequacy of Mandamus*
- *B. Collateral Appeal Doctrine*
- *C. Basis for Disqualification*
- *D. Case Analysis*

*Conclusion* ..... *13*

## *TABLE OF AUTHORITIES*

*Berger v. U.S.*, 255 U.S. 22 (1921).....2,3

*Cohen v. Beneficial Loan Corp.*,.....9
337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949).

*In re Cement Antitrust Litig.*,.....8
688 F.2d 1297 (9th Cir. 1982)

*In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976)...8

*Johnson v. Jones*, 115 S. Ct. 2151 (1995).....11

*Mitchell v. Forsyth*, .....10
472 U.S. 511, 105 S. Ct. 2806 (1985).

*Puerto Rico Aqueduct & Sewer Auth. v.....10,11*
*Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993)

*Texaco Inc. v. Chandler*, ..... 8
354 F.2d 655 (10th Cir. 1965)

*Will v. United States*, 389 U.S. 90 (1967) ..... 8

*Statutes and Rules*

28 U.S.C. section 144.....11
28 U.S.C. section 455.....11, 12
28 U.S.C. section 1292 (a)..... 8
28 U.S.C. section 1292 (b)..... 8
F.R.C.P. Rule 11..... 11

*Law Review Articles*

B. Cardozo, *The Nature of the Judicial Process*, 112 (1921); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harvard Law Rev. 736, 746-47 (1973); .....11

Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, Hastings Law Journal, May 1984. .....8,9,12

Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, Drake Law Review, 1998 .....9,10

## *TABLE OF APENDICES*

*5th Circuit Court of Appeal's dismissal of Petitioner's Appeal* ..... *1a*

*5th Circuit Court of Appeal's Order denying Petitioner's Petition for Panel Rehearing*..... *2a*

*Plaintiff's Motion to Recuse*..... *3a*

*Defendant's Second Motion to Substitute Counsel*... *4a*

*District Court Judge's dismissal orders*..... *5a (1-4)*

*District Court Judge's stay of discovery*..... *6a*

*District Court Judge's denial of recusal motion*..... *7a*

## *OPINIONS BELOW*

The 5th Circuit Court of Appeal's order denying Petitioner's Petition for Panel Rehearing is reprinted in the appendix, 2a. Also, the 5th Circuit Court of Appeal's dismissal is included, 1a. Finally, the District Court Judge's dismissal and denial of recusal orders are in the appendix, 5a (1-4), 7a, respectively.

## *STATEMENT OF JURISDICTION*

The 5th Circuit Court of Appeal entered its judgment on Panel Rehearing on July 8, 2003 and Petitioner 90 days later has filed this writ. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1).

## *STATUTORY PROVISIONS INVOLVED*

*28 U.S.C. section 144 Bias or Prejudice of a Judge*

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the Judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

*28 U.S.C. section 455 Disqualification of a Judge*

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

## *STATEMENT OF THE CASE*

### *Introduction*

Back in 1921 Justice Joseph McKenna in *Berger v. U.S.* illuminated the inadequacy of the "final rule" doctrine by stating, "It comes after the trial and, if prejudice exist, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal

ingredient". *Berger v. U.S.*, 255 U.S. 22, 29 (1921). The case at bar is a prime example of the evil that has worked throughout this case to the detriment of Petitioner and more importantly, to the Federal Judiciary as a whole.

*Statement of the Facts*

As stated in his *Complaint* Petitioner was studying to take the bar exam and after studying all week he decided on a Friday afternoon to turn in to the administration building an abandoned little girl's he had seen every day in front of the library. *Complaint* (5/16/02), *lines* 10-13. As stated in the first university police officer's affidavit Petitioner was stopped as he was walking a bike on the sidewalk in the direction of the administration building and that the bike, "seemed too small for him". *See Exhibit* A, Affidavit of Officer Sellers Bailey in *Defendant Bailey's Motion for Summary Judgment,* (8/1/02) pg. 1.

Petitioner answered the officer's questions and did state that the bike was abandoned and that it was being taken to be turned in to the administration building. *Complaint, line* 17. Afterward, the officer checked for registration numbers and found none, and then he called for a second backup officer. *Id.* at 18. It was at this initial contact with Petitioner that the first officer states in affidavit, "All of this led me to believe that Leal had stolen the bike, so I requested a backup officer be dispatched to my location". *See Exhibit* "P-6", Officer Bailey's Offense/Incident Report, *Plaintiff's Motion in Opposition to Defendants Faulkner, Clubb, and Van Slyke's Partial Motion to Dismiss for Failure to State a Claim,* (9/13/02) pg.1.

A second back-up officer arrived and Petitioner again stated what he was doing there. Petitioner was called a liar in front of a passing crowd and arrested for theft. *Complaint, lines* 19-21.

It was later discovered that Petitioner was charged with stealing a 10-speed mountain bike and that the charges were dismissed because the owner of the bike was not found. *See Exhibit* "P-3", Officer Bailey's Complaint in *Plaintiff's Motion in Opposition to Defendant Bailey's Motion for Summary Judgment,* (9/13/02) and also *See Exhibit* A, Affidavit of Sellers Bailey in *Defendant Bailey's Motion for Summary Judgment,* (8/1/02) pg.3.

Petitioner, an Alumni member, wrote several letters to the president of the university and other administrative officials concerning this incident. *Complaint, line* 28. After an preliminary investigation it was the official administrative position that, "This incident occurred quite some time ago and information regarding the bicycle in question, even if available, would add little substance to your grievance... While perfection is not always achieved, the underlying facts in this situation are not in question". *See Exhibit* "P-5", in *Plaintiff's Motion in Opposition to Defendants Faulkner, Clubb, and Van Slyke's Partial Motion to Dismiss for Failure to State a Claim,* (9/13/02).

It is of interest to note that Petitioner was ordered to appear in Travis County Court on 6/20/00 to answer charges of theft. He made an appearance on 6/20/00. The Assistant County attorney dismisses the charges on 6/26/00. Petitioner was again ordered to appear on 7/11/00 and Petitioner makes that appearance. Finally, Petitioner was again ordered to face charges of theft on 8/1/00. Petitioner makes his final appearance to answer charges on 8/1/00. *See Exhibits* "P-12" thru "P-14", in *Plaintiff's Motion in Opposition to Defendant Gonzalez's Motion to Dismiss for Failure to State a Claim,* (11/9/02).

Moreover, Petitioner was arrested on May 19, 2000; however, an F.B.I. criminal record report dated July 17, 2001 used for admission to the Bar did not contain any

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record of the arrest. *See Exhibit* "P-8", in *Plaintiff's Motion in Opposition to Defendants Faulkner, Clubb, and Van Slyke's Partial Motion to Dismiss for Failure to State a Claim,* (9/13/02). On August 26, 2002, a few months after Petitioner files suit Petitioner's arrest record is checked again and mysteriously the record of the May 19, 2000 arrest did appear. *Id, Exhibit* "P-9".

Moreover, Petitioner on 5/16/02 files suit in Federal Court alleging among other causes of action *section* 1983, *section* 1983 conspiracy, and RICO violations. In an effort to end the matter amicably Plaintiff made two settlement offers served on Oct 8 and Nov 30. Both of these offers were ignored and remain unanswered to this day by the defense.

It was later revealed that "attorney in charge" Travis Lucas from the Attorney General's Office abandoned this case and did not properly substitute counsel.

Then a Jo Ann Pearce from the Attorney General's Office, who had never been admitted to practice in Federal Court, perpetrated a fraud upon the Court by signing as "attorney in charge" in several filed documents. One such document was her *Motion for Protective Order* (1/8/03), to protect defendants Faulkner, Clubb, Slykes, Bailey, and Gonzales; however, defendants Officer Koehl and the UT Police Dept. were excluded from the motion.

In an obvious effort to avoid discovery Jo Ann Pearce, now Jo Ann Fine, stated the listed defendants were entitled to protection from discovery since the defendants pleading qualified immunity were entitled to dismissal before commencement of discovery because Plaintiff's allegations stated claims that were not "clearly established law". She cites *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806 (1985). Clearly, *section* 1983, *section* 1983

conspiracy, and RICO are "clearly established law"; therefore, *Mitchell* is inapplicable.

Later that month on **1/23/03** Judge Nowlin denies Jo Ann Fine permission to appear in Federal Court; her motion to appear *Pro Hac Vice* and her motion to *Substitute Counsel* is denied. Co-counsel familiar with the Federal Rules had not yet been assigned to her and she had not yet paid the *Pro Hac Vice* fee. No decisions had yet been made on Plaintiff or Defendant's substantive motions.

On 2/26/03 Plaintiff motions Judge Nowlin to recuse himself since he had failed to decide this case having more than ten of Plaintiff's substantive motions alone undecided. *See Appendix* 3a On 3/10/03 Judge Nowlin who refusing to recuse himself made several orders, some from motions dating back half a year, dismissing all defendants, except two, defendants Koehl and UT Police Dept.

In a separate included order issued on the same day, not requested by the defense, Chief Justice Nowlin became an aggressive advocate for the defense by himself initiating an order that stayed discovery on the only remaining defendants, defendant Koehl and defendant UT Police Dept.

This was done even though Jo Ann Fine who initiated the motion for protection to stay discovery (1/18/03) had no permission to be in Federal Court when she filed that motion. Also, the protection motion had not included the later two defendants. Finally, the motion for protection was clearly based on inapplicable law.

Plaintiff opposed documents filed by Mrs. Jo Ann Fine before she was admitted to Federal Court and before she substituted counsel; however, Judge Nowlin ignored this fact even though he had denied Jo Ann Fine's motions to substitute and to appear *Pro Hac Vice on* 1/23/03.

Defendant Koehl was later dismissed; however, the UT Police Dept. still remains as a defendant but a defendant without discovery. Moreover, Jo Ann Fine later became legitimately "attorney in charge" of this case. However, her statements in motions rivaled those of Mohammed Seed al-Sahaf, the Iraqi Minister of ***Dis***-Information in last days of the war.

In one document alone entitled, *Defendant Koehl's Reply to Plaintiff's Motion in Opposition to Defendant Koehl's Motion for Summary Judgment* (4/24/02) she manages no less than 8 material misrepresentations. In that document Mrs. Jo Ann Fine defends the legitimacy of the documents she had filed before she was admitted to Federal Court and before she properly substituted counsel by stating, "Further, the court has granted the undersigned permission to proceed *Pro Hac Vice*". *Id.* pg 3. Plaintiff filed three distinct Rule 11 Motions for Sanctions for material representations covering separate documents filed by Mrs. Jo Ann Fine including the above-mentioned motion; however, all motions were denied.

Immediate appealability of the February 26, 2003 recusal order would have prevented the subsequent detrimental actions by the Judge Nowlin. However, do the facts of the case warrant immediate appealibilty under the Cohen doctrine? Petitioner submits that it does.

*REASONS FOR GRANTING THE WRIT*

This Court despite their increased frequency has not yet directly addressed the question of immediate review of judicial disqualification decisions. The appellate courts are divided concerning the use of the collateral order doctrine, writs of mandamus, and other theories.

For instance, a majority of circuit courts allow mandamus and some have allowed the collateral order

exception and occasionally a willing judge has utilized the statutory interlocutory appeal, 28 USCA section 1292 (b).[1] However, for a judge who refuses to disqualify her or himself, as in the case at bar, mandamus and the collateral order exception remain as the only viable alternatives. Plaintiff appeals from the Fifth Circuit, which does allow mandamus.[2]

*A. INADEQUACY OF MANDAMUS*

The standard of review in mandamus proceedings is apparently stricter than that for appeal under the collateral order doctrine and may create the potential for duplicative review of judicial disqualification motions. *Id.*at 4. This Court has indicated that mandamus is appropriate only to correct clear abuses of discretion. *Will v. United States*, 389 U.S. 90, 103-04 (1967). It has been argued that if the trial judge has ruled on the question of his own partiality the reviewing court should decide the issue *de novo* rather than defer to the trial judge especially in issues of law. *In re Cement Antitrust Litig.*, 688 F.2d1297, 1307 (9th Cir. 1982)

Nevertheless, appellate courts have in some instances granted petitions for writs of mandamus in circumstances encompassed by appearance–bias type cases. See *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976) and *Texaco Inc. v. Chandler*, 354 F. 2d 655 (10th Cir. 1965) However, the writ of mandamus has and continues to be viewed in its traditional sense, a writ to used in extraordinary circumstances. *Supra*, Anderson, at 4.

*B. COLLATERAL APPEAL DOCTRINE*

*Background*

Federal Circuit Courts have jurisdiction only over three types of appeals: (1) final orders, 28 U.S.C. section 1291; (2) certain specific types of interlocutory appeals, such as

[1&2] Karen Nelson Moore, *Appellate Review of Judicial Disqualification Decisions in the Federal Courts*, pg. 1, Hastings Law Journal, May 1984.

those where injunctive relief is involved, 28 U.S.C. section 1292 (a) (1); and (3) appeals where the district court has certified the question as final pursuant to Federal Rule 54 (b), 28 U.S.C. section 1292 (b). The case at bar does not fit into any of these three types.

The final judgment rule serves four congressional policies: it protects the authority of trial judges by forbidding piecemeal appeals of pretrial orders, it protects the appellate courts from the intolerable burden of conducting immediate review of countless pretrial orders, it protects litigants with meritorious claims and defenses from the expense and harassment of multiple appeals, and finally it protects society's interest in having a legal system that resolves lawsuits as cheaply and quickly as possible.[3]

At first glance one may conclude that allowing a collateral appeal before final judgment would necessarily have an effect counter to the congressional policy rational baring immediate collateral appeals. This may not be the case. In some cases a considerable amount of time and expense is expended in long and protracted trial and all is for not since a Judge back in the beginning of the case improperly refused to recuse. *Id* at 3

Also, protecting the authority of the Judge is not accomplished by preventing collateral appeal of disqualification orders. For instance, a bias judge has no authority to sit on a case. Therefore, his authority is not protected by simply allowing him to continue to preside. On the other hand, validation of his authority by appeal would assuredly protect his authority. *Id*

Finally, what the current status of case law today is

[3]Lloyd C. Anderson, *The Collateral Order Doctrine; A New "Serbonian Bog" and Four Proposals for Reform*, Drake Law Review pg. 2, (1998).

telling us is that there exists a countervailing policy that is of such magnitude as to override the initial *Cohen* policy reasons. *Id* at 23 That policy goes to the heart of the judicial process itself and that it has been evident to most practitioners of law. They understand that a bias judge who is allowed to sit on a case will make bias decisions and those decisions erode public confidence in the integrity, honesty, and impartially of the Judiciary. *Id* The following discusses how we got there.

*(a) Cohen in the Beginning*

The *Cohen* case involving a shareholder derivative suit provided an exception to the final order requirement under 28 U.S.C. section 1291. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Initially under *Cohen* the application of the doctrine had three requirements: "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment". *Id* at 544. To further limit the amount of appeals the Court in *Cohen* stressed that defendant's appeal presented a "serious and unsettled question". *Id.* at 547.

*(b) Cohen- Evolving*

Beginning in the early 1960's this Court began expanding the collateral order doctrine until it culminated in the precedent of the 1985 decision in *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806 (1985). Moreover, fairly recently in *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) this Court confirmed it by rejecting the strict interpretation of *Cohen* and stating that the prime consideration is the importance of the interest asserted instead of the burden on litigation. *Supra, Anderson* at 23.

*(c) Cohen-Current Status*

The *Puerto Rico Aqueduct* decision has doctrinal significance in two respects. First, the Court rejected the use of the strict *Cohen* formulation of the collateral order doctrine in favor of the broad *Mitchell* formulation. *Id.* at 23. Secondly, Justice Scalia'a call for an alternative approach based on the importance of the claimed right won the day and altered the definition of reviewability. *Id*

Importantly, a later case, *Johnson v. Jones*, 115 S. Ct. 2151 (1995) added clarity because it explained that the purpose of allowing a collateral order appeal is "to protect especially important interests against irreparable harm". *Id* at 25

In judicial disqualifications that especially important interest is one evident to most practitioners of law who have encounter the issue, that of public confidence in the impartiality of the judiciary. The late Justice Benjamin N. Cardozo eloquently and insightfully commented on collateral appeals by stating:

"A fundamental concern of our judicial system is to provide impartial justice both in appearance and in fact. Permitting a judge who is or appears to be bias to try a case, and allowing review only after final judgment, is an enormous encroachment on this fundamental value. Such considerations far outweigh the objection to piecemeal appeals, which mitigate against immediate review of judicial decisions".[4]

*C. BASIS FOR DISQUALIFICATION*

The basis for virtually all judicial disqualification motions falls within 28 U.S.C. section 144 and 28 U.S.C. section 455. Increasing as in the case at bar section 455 is

[4]Benjamin N. Cardozo, *The Nature of the Judicial Process* 112 (1921); Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 Harvard L. Rev. 736, 746-47 (1973).

utilized because it is easier to apply, lacks formal requirements such as an affidavit, and has a broader scope. For instance revised section 455 (a) requires a federal judge to disqualify himself in "any proceeding in which his impartiality might reasonably be questioned".

Secondly, a judge must disqualify himself when he or she has personal bias or prejudice either against him or in favor of any adverse party and when one of five listed relationships exist. *Section* 455 (b) (1-5). This second portion delineates particular relationships that require disqualification because of an inherent likelihood to give the appearance of bias.

Karen Nelson Moore in her law article, entitled *Appellate Review of Judicial Disqualification Decisions In The Federal Courts*, offers insightful and in depth analysis of judicial disqualification. She classifies disqualification orders into two paradigmatic Models. Model I is the appearance-bias that deals with certain relationships, which are proscribed under *sections* 455 (b)(2-5) and Model II deals with bias-in-fact, *section* 455 (b)(1). *Supra*, Moore,3.

Karen Nelson Moore who is now a Judge concludes that both Model I and Model II judicial disqualification cases ordinarily will satisfy the *Cohen* requirements and will not frustrate the policies against interlocutory appeal. *Id* at 12. However, she states that appellate review of Model II cases are more difficult since they necessarily involve getting in the mind of the lower court judge, whereas, Model I, appearance-bias, simply involves the question of whether the relationship exists. *Id*. at 8.

*D. CASE ANALYSIS*

The case at bar contains both Model I and Model II biases as formulated by Karen Nelson Moore. Judge Nowlin was a graduate of the University of Texas Law

School and Plaintiff was suing the University of Texas. Although this relationship was not specifically included in *sections* 455 (b) (2-5), it is arguably every bit as corrupting as those mentioned. If this argument is not persuasive it at the very least has the "appearance of bias". Therefore, Model I, appearance-bias, is present in this case.

Model II, bias-in-fact, is also present in this case. Now before Plaintiff's February 26, 2003 *Motion for Recusal,* Judge Nowlin has left more than 10 of Petitioner's substantive motions alone undecided. When Judge Nowlin finally started to decide substantive motions on March 10, 2003, he was deciding motions dating back more than half a year.

Moreover, it is apparent that a Judge who will not adjudicate a case has some bias, especially in Federal Court where every one involved including the parties is under stringent time restraints. For instance. a party has 11 days to oppose a motion and the Judge has "motion day" periodically during the month to decide motions. The crux of the matter is that a Judge's action of what amounts to "inaction" is nothing less than tantamount to denial of Plaintiff's fundamental right of due process. Plaintiff was compelled to appeal the recusal denial; the alternative was to wait and see if Judge Nowlin would be so motivated as to graciously throw a decision his way. Therefore, Model II, bias-in-fact, is also applicable in this case.

Finally, it is particularly compelling to allow immediate collateral review of judicial disqualification orders when arguably as in the case at bar both Model I, appearance-bias, and Model II, bias-in-fact, exist.

*CONCLUSION*

Despite the obvious detriment of Petitioner's fundamental due process rights, the real important detriment is to the erosion of public confidence in the

honesty, integrity, and impartiality of the Federal Judiciary. The current case law suggests that this later factor is of the utmost importance and is of such magnitude as to override the initial policy objections of piecemeal decisions and other objections to immediate review of judicial disqualification by the appellate courts. The time has come and the time is ripe for a decision.

It has been stated that the collateral order doctrine has been used to insure the health of the Federal Judiciary. Metaphorically, if that is so, then the most critical of conditions threatening the patient is that of the insidious and malignant cancer being the barrier of immediate appealability of judicial disqualification orders. Without deliberate and immediate action assuredly the very life of the Judiciary stands in the balance.

For the forgoing reasons, Petitioner solemnly requests this Court to decide that he is entitled by law to immediate appeal of Judge Nowlin's recusal denial to the 5th Circuit Court of Appeals by granting this writ of certiorari.

*Respectfully submitted,*

Tony Falcon Leal Jr., ***Pro Se***
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# APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50396
USDC No. A-02-CV-322-JN
TONY FALCON LEAL, JR.,

versus Plaintiff-Appellant,

UNIVERSITY OF TEXAS, UT POLICE DEPARTMENT, LARRY FAULKNER UT PRESIDENT, PAT CLUBB, Vice President of Employees, JEFFERY VAN SLIKE, UT Chief of Police, SELLERS BAILEY, GONZALO M. GONZALES, III, Supervising Officer, and JOHN D. KOEHL, Assisting Officer,
Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas
Before SMITH, WIENER, AND CLEMENT,
Circuit Judges.

BY THE COURT:

This court must examine the basis of its jurisdiction on its own motion if necessary. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir . 1987). In this civil rights case, the plaintiff filed a notice of appeal from orders of the district court 1) denying his motion for recusal of the district judge, 2) dismissing all defendants except one, and 3) staying discovery against the remaining defendant.

Federal appellate courts have jurisdiction over appeals only from (1) final orders, 28 U.S.C. section 1291; (2) orders that are deemed final due to jurisprudential exception or which can be properly certified as final pursuant to Fed. R. Civ. P. 54 (b);

and (3) interlocutory orders that fall into specific classes, 28 U.S.C. section 1292 (a), or which can be properly certified for appeal by the district court, 28 U.S.C. section 1292 (b). See Dardar v. Lafourche Realty Co., 849 F.2d 955, 957 (5th Cir. 1988); Save the Bay, Inc. v. United States Army, 639 F.2d 1100, 1102 (5th Cir. 1981). The district court's orders denying recusal, dismissing all defendants except one, and staying discovery are not final orders and we can discern no basis for appellate jurisdiction.

APPEAL DISMISSED

s/ SMITH, s/ WIENER, s/ CLEMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 03-50396

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TONY FALCON LEAL, JR.,
versus Plaintiff-Appellant,
UNIVERSITY OF TEXAS, UT
POLICE DEPARTMENT, LARRY FAULKNER
UT President, PAT CLUBB, Vice President of
Employees, JEFFERY VAN SLIKE, UT
Chief of Police, SELLERS BAILEY,
GONZALO M. GONZALES, III
Supervising Officer, and JOHN D. KOEHL,
Assisting Officer,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas
(A-02-CV-322-JN)

ON PETITION FOR REHEARING

Before SMITH, WIENER, AND CLEMENT,
Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's petition for panel rehearing, and his petition for rehearing en banc which we treat as a petition for panel rehearing, are DENIED. Appellant is incorrect in his contention that an order denying a recusal motion is an appealable collateral order. See Nobby Lobby, Inc. City of Dallas, 970 F.2d 82, 85 n.3 (5ht Cir. 1992).

s/ SMITH, s/ Wiener, s/ Clement dated 7/8/03

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
Plaintiff

Civil Action # A-02-CV-322JN

vs.

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**
Defendants.

**PLAINTIFF'S MOTION FOR JUDGE JAMES R. NOWLIN TO RECUSE HIMSELF OF SAID CASE FOR CONFLICT OF INTEREST**

**NOW COMES Plaintiff** Ton Falcon Leal, Pro Se, who submits the following **PLAINTIFF'S MOTION FOR JUDGE R. NOWLIN TO RECUSE HIMSELF FOR CONFLICT OF INTEREST**. In support thereof, Plaintiff offers the following:

**STATEMENT OF FACTS**

Plaintiff, Tony Falcon Leal, alleges the following **well established law** claims against the University of Texas, University of Texas Administrators, and University of Texas Police Officers; Fourth Amendment civil rights violations, false arrest, slander, "prima facie tort, negligence, and gross negligence". Plaintiff was accused of stealing a woman's bicycle. Plaintiff further alleges that police changed the evidence and falsified affidavits to effect an unlawful arrest.

**ARGUMENT**

It has come to Plaintiff's attention that you Judge Nowlin are a graduate of the University of Texas i.e. the

University of Texas Law School. Therefore an apparent conflict of interest exists.

In addition, the following of the Plaintiff's motions/request have not been addressed:

1. 9/14/02 Plaintiff's Motion in Opposition to Defendants' Faulkner, Clubb, and Van Slyke's Partial Motion to Dismiss for Failure to State a Claim
2. 9/14/02 plaintiff's Motion in Opposition to Defendant Bailey's Motion for Summary Judgment
3. 11/9/02 Plaintiff's Motion in Opposition to Defendant Gonzales's Motion to Dismiss for Failure to State a Claim
4. 12/7/02 Plaintiff's Motion to Validate Service of Process
5. 12/10/02 Plaintiff's Request to Set a Trial Date (to Judge Nowlin; another request was given to the Clerk, both undecided)
6. 12/23/02 Plaintiff's Motion for Default Judgment (UT Police)
7. 1/18/03 Plaintiff's Motion for Default Judgment (John Koehl)
8. 2/4/03 Plaintiff's Motion for Sanction for Discovery Abuse and Unethical Conduct
9. 2/18/03 Plaintiff's Motion for Sanctions Against Jo Ann Pearce Under Rule 11 (b) of the F.R.C.P..

This has the appearance of impropriety. Moreover, Plaintiff filed his last listed motion, Motion for Sanctions Against Jo Ann Pearce (2/18/03) simultaneously with Jo Ann Pearce's Defendants' Second Motion to Substitute Counsel filed on the same day (2/18/03). To decide Jo Ann Pearce's motion while leaving Plaintiff's numerous other motions/request **undecided** has the further appearance of impropriety.

**PRAYER**

Plaintiff prays that **PLAINTIFF'S MOTION FOR JUDGE JAMES R. NOWLIN TO RECUSE HIMSELF**

**OF SAID CASE FOR CONFLICT OF INTEREST** be granted and that this case be assigned to another Judge.

Respectfully Submitted;
s/ Tony Falcon Leal, *Pro Se*

**Certificate of Service**

I, Tony Falcon Leal Jr., do hereby certify that a true and correct copy of the above Plaintiff's Motion For Judge James R. Nowlin To Recuse Himself Of Said Case For Conflict of Interest has been served by placing in the United States Mail on this February 26, 2003 addressed to:
Travis Lucas, Asst. Atty Gen.
P.O. Box 12548
Austin, Texas 78711-2548

s/ Tony Falcon Leal Jr., *Pro Se*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
Plaintiff,

Civil Action # A-02-CV-322JN

v. JURY

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**
Defendants.

**ORDER**

On this day, **Defendants' Second Motion to Substitute Counsel** came to be heard. After considering the pleading of the parties, the Court is of the opinion that it should be **GRANTED.**

**SIGNED** this 26th day of February 2003.

s/ James R. Nowlin
JUDGE PRESIDING

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
Plaintiff

Civil Action # A-02-CV-322JN

v. JURY

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**

Defendants.

**ORDER**

On this day **came Defendants Dr. Larry Faulkner, Dr. Pat Clubb, and Jeffery Van Slyke's Partial Motion to Dismiss for Failure to State a Claim** before the Court for hearing. After considering the defendants' motion and the pleadings of the parties herein, the Court is of the opinion that the motion should be granted.

It is, therefore, ordered that **Defendants Dr. Larry Faulkner, Dr. Pat Clubb, and Jeffrey Van Slyke's Partial Motion to Dismiss for Failure to State a Claim** is granted, and that the claims made against these defendants by the plaintiff are dismissed for failing to state a claim.

**SIGNED** this 10th day of March 2003.

s/ James R. Nowlin
JUDGE PRESIDING

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
Plaintiff

Civil Action # A-02-CV-322JN

VS.

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**

Defendants.

**ORDER**

On this day came **Defendant The University of Texas at Austin's Motion to Dismiss for Lack of Subject Matter Jurisdiction** before the Court for hearing. After considering the defendants' motion and the pleadings of the parties herein, the Court is of the opinion that the motion should be granted.

It is, therefore, ordered that Defendant The University of Texas at Austin's Motion to Dismiss for Lack of Subject Matter Jurisdiction is granted, and that the claims made against these defendants by the plaintiff are dismissed for failing to state a claim.

**SIGNED** this 10th day of March 2003.

s/ James R. Nowlin
JUDGE PRESIDING

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
Plaintiff

Civil Action # A-02-CV-322JRN

VS.

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**
Defendants.

**ORDER**

Before the Court is Defendant Gonzalez's Motion to Dismiss for Failure to State a Claim filed on September 27, 2002 (Clerk's Doc. No. 40). Plaintiff Tony Falcon Leal, Jr.'s did not file a response until November 14, 2002, well pass the deadline. Plaintiff request for an extension of time to respond was denied because it was untimely filed. To date, Plaintiff has not sought leave to file his response out of time therefore it not properly before the Court.

After considering the Defendant's motion and the pleadings of the parties herein, the Court is of the opinion that the Defendant's motion should be granted.

**IT IS THEREFORE ORDERED** that Defendant Gonzalez's Motion to Dismiss for Failure to State a Claim is granted. All claims made against Defendant Gonzalez by the Plaintiff are dismissed with prejudice for failing to state a claim.

**SIGNED** and **ENTERED** this 10th day of March 2003.

s/ James R. Nowlin
JUDGE PRESIDING

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
Plaintiff,

Civil Action # A-02-CV-322JRN

vs.

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**
Defendants.

**ORDER**

Before the Court is Defendant Bailey's Motion for Summary Judgment (Clerk's Doc. No. 22) and Plaintiff Tony falcon Leal's Response (Clerk's Doc. No. 35). After considering the arguments and applicable case law, the Court enters the following Order.

Plaintiff Leal sued Defendants University of Texas, Austin, Dr. Larry Faulkner, Dr. Pat Clubb, Jerry Ban Slyke and Sellers Bailey alleging federal and state law claims: Fourth Amendment civil rights violations brought under 42 U.S.C. section 1893, civil conspiracy, malicious prosecution, RICO violations, false arrest, slander, prima facie tort, negligence, and gross negligence. Plaintiff was arrested by Defendant Sellers Bailey on May 19, 2000, for alleged violations of the University of Texas regulations. Specifically, Plaintiff was stopped by Defendant Bailey for riding a bike on the sidewalk on the campus of the University of Texas. During the stop Defendant Bailey made the determination that Leal was stealing the bike and placed him under arrest. Leal contends that he was merely

returning the bike to the administration and the officer illegally arrested him.

Defendant Bailey moves for summary judgment pursuant to FED.R.CIV.P. 56. Rule 56 facilities the efficient disposal of cases presenting no genuine factual questions. FED. R. CIV. P. 56(c). Summary judgment is proper when the movant shows that the pleadings, affidavits, and other evidence available to the court establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Singh v. Shoney's*, 64 F.2d 217, 218 (5th Cir. 1995); *Ray v. Tandem Computers*, Inc., 63 F.3d 429, 433 (5th Cir. 1995); *International Shortstop, Inc. v. Rally Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 112S.Ct. 936 (1992).

Once the material facts are assessed, the Court must determine whether the evidence reveals the presence of genuine factual issues. A genuine issue exists when, in the context of the entire record, a reasonable fact-finder could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). all evidence and inferences drawn therefrom are viewed in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Credibility determinations play no role in the Court's evaluation of the proof. *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 (5th Cir. 1993).

Defendant Bailey contends he is entitled to qualified immunity. Under the doctrine of qualified immunity peace officers are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow .v Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Court must decided with qualified immunity exist. Mitchell v. Forsyth, 472 U.S. 511, 527-529, 105 S.Ct. 2806, 2815-2817 (1985).

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL JR.,**
*Plaintiff,*

Civil Action # A-02-CV-322JN

VS.

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**
*Defendants.*

**ORDER**

Came on to be heard **Defendants' Motion for Protective Order**, and the Court after considering the pleadings of the parties filed herein, is of the opinion that the following order should issue:

It is hereby **ORDERED** that said motion be, and it is hereby **GRANTED**. All discovery directed by the Plaintiff to Defendants is stayed pending the determination of Defendants entitlement to qualified immunity.

SIGNED on this the 10th day of March, 2003.

s/ James R. Nowlin
JUDGE PRESIDING

The government official's liability turns on the "objective legal reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038 (1987).

Defendant Bailey's offense report stated that he observed Plaintiff Leal riding a bike on the sidewalk, which is a violation of the University of Texas at Austin's parking and traffic regulation. By the time he turned his car around he spotted Leal walking the bike. Defendant Bailey stopped Leal for the observed violation and proceeded to investigate. Defendant Bailey noticed the bike was a little small for Leal, was women's model and had a U-lock holder but no U-lock. Believing the Leal had committed at least one criminal offense, Defendant Bailey arrested Leal.

Given the totality of the situation, a reasonable officer could have thought Defendant Bailey had probable cause to believe Leal has committed at least one criminal offense and that arresting Leal was reasonable. The Court finds that Defendant Bailey is entitled to qualified immunity.

THEREFORE IT IS ORDERED that Defendant Sellers Bailey's Motion for Summary Judgment is GRANTED. Plaintiff's claims against defendant Sellers Bailey, III, are DISMISSED WITH PREJUDICE.

SIGNED and ENTERED this 10th day of March 2003.

s/ James R. Nowlin
CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

**TONY FALCON LEAL,**
Plaintiff,

Civil Action # A-02-CV-322JRN

vs.

**UNIVERSITY OF TEXAS AT AUSTIN, ET.AL.,**
Defendants.

**ORDER**

Before the Court is Plaintiff Tony Falcon Leal's Motion for Judge James R. Nowlin to Recuse Himself of Said Case for Conflict of Interest (Doc. No. 76). Plaintiff Leal asserts that because Judge Nowlin graduated of the University of Texas School of Law and the University of Texas is a party in this case, Judge Nowlin should recuse himself. After reviewing the argument, applicable case law and judicial guidelines, the Court finds that the motion should be denied.

**THEREFORE, IT IS ORDERED** that Plaintiff's Tony Falcon Leal's Motion to Recuse is **DENIED.**

signed and **ENTERED** this the 20th day of March 2003.

**s/ JAMES R. NOWLIN**
**CHIEF UNITED STATES DISTRICT COURT**